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IN THE

Supreme Court of the United States

October Term, 1957

No. 816

THE NEW YORKER MAGAZINE, INC.,

Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

PETITION FOR REHEARING

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Appellant prays that this Court grant rehearing of its order of April 28, 1958, dismissing the appeal herein on the authority of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

Reasons for Granting Rehearing

The Court has noted probable jurisdiction in *Northwestern States Portland Cement Co.* v. *Minnesota*, No. 606 this Term, and has granted certiorari in *Williams* v. *Stockham Valves and Fittings, Inc.*, No. 763 this Term (a Georgia case). Both of these cases, scheduled for argument successively at the next Term, involve the validity under the commerce clause of state taxes upon the net income from

interstate commerce of foreign corporations. The problems in these cases have a direct bearing upon the issues in the instant case. For this substantial reason, we submit that the Court should

(1) grant a rehearing and note probable jurisdiction in the present case to set the stage for a fuller exploration of the commerce questions already before the Court, or, alternatively,

(2) postpone final disposition of this petition for rehearing until after the decisions in Nos. 606 and 763.

Either of these alternatives will insure that the final disposition of the instant case will be consistent with the cognate rulings in the Minnesota and Georgia cases.

If this Court ultimately sustains the state income-taxing power asserted in the pending cases, the existence of a potential multiple burden upon the present appellant becomes inescapably clear. It will be obvious following such a decision that this appellant is exposed to taxes upon its advertising receipts in all the states where its salesmen regularly and intensively solicit advertising and where advertising sales offices are maintained by or for it.

This substantial possibility of multiple taxation if New York City's unapportioned tax is allowed to stand, turning upon the outcome of the two cases awaiting argument, is a matter of the highest significance in view of the fact that the dismissal of the appeal herein was grounded squarely and exclusively upon *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250. For the result in *Western Live Stock* was determined almost entirely by this Court's conclusion that there was, in the factual and legal context of that case, no threat of a multiple tax burden. See 303 U. S. at 255-7, 258, 259, 260-1. Such a conclusion, should

the Court uphold the Georgia and Minnesota taxes now before it, will be impossible in this case.

This is true, of course, despite the fact that the taxes in the two pending cases are income rather than privilege or franchise taxes. This Court's decisions leave no doubt that (1) a multiple burden may arise from taxes of different kinds, even upon different taxpayers, and (2) such forbidden burdens are present whenever another state might tax a related aspect of the commerce if it were not for the protection of the commerce clause:

(1) The vice condemned in *Western Live Stock* as characteristic of those taxes measured by gross receipts from interstate commerce which have been held unconstitutional "is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." 303 U. S. at 255-6. None of the numerous decisions cited in *Western Live Stock* (pp. 255-57) for the "multiple burden" doctrine, and none of the subsequent decisions holding taxes invalid on this ground, indicates that this evil disappears when the states in which the business is conducted vary their taxes on the commerce so as to reach net income on the one hand, or gross receipts on the other, or because one state calls its levy a franchise tax, a second calls it a privilege tax, and a third uses some other label. On the contrary, it seems clear under this doctrine that a gross receipts tax may be invalid because another state could levy a sales tax or use tax upon the same transaction. See Mr. Justice Rutledge concurring in *Freeman* v. *Hewit*, 329 U. S. 249, 283 and n. 46, and in *International Harvester*

Co. v. *Dept. of Treasury*, 322 U. S. 340, 359. Indeed, the tax may be invalid because another state could levy a tax upon a different, though related, aspect of the commerce, falling upon a different taxpayer. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 429; see discussion of *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650, in *Western Live Stock*, 303 U. S. at 260-61, as analyzed in our Statement as to Jurisdiction, pp. 18-19.

(2) A multiple burden may arise from a tax which could be levied by another state only if there were no interstate commerce clause; in such case the commerce clause operates to free the business or transaction from tax in either state. *Western Live Stock*, 303 U. S. at 260; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438-39; see discussion of the *Adams* case by Mr. Justice Rutledge, concurring in *Freeman* v. *Hewit*, 329 U. S. 249, 274-76. Because this is so, there can be no doubt of this appellant's exposure to potential multiple burdens if the Court affirms the income-taxing power in the Minnesota (No. 606) and Georgia (No. 763) cases awaiting argument. For such affirmance will mean that there are neither commerce nor due process objections to the taxes involved (both objections are made by the taxpayers and were sustained by the state court in the Georgia case). And elimination of the due process problem will leave it clear that, "without the commerce clause" (*Western Live Stock*, 303 U. S. at 260), *privilege taxes* as well as income taxes would be leviable on similar facts by states other than New York upon the advertising receipts of this appellant.

We submit, in short, that, if the Minnesota and Georgia taxes now before the Court are upheld, thus exposing this appellant to repetitive taxes in all the states where it regularly and intensively solicits advertising, the unapportioned

New York City privilege tax on this appellant's gross advertising receipts must be held invalid under the multiple-burden doctrine as expounded by this Court. This is a crucial distinction from *Western Live Stock* for reasons which may be quickly summarized:

(1) There were no allegations in *Western Live Stock* of the pertinent facts established in this case—that appellant has offices outside New York and has salesmen who regularly and systematically solicit advertising in other states. In *Western Live Stock* the lack of a possible multiple burden was predicated solely upon the absence in states other than New Mexico of any "dominion over the magazine or its subscribers" (303 U. S. at 260), and was not based upon any consideration of the effect of advertising solicitation in other states.

(2) The problem of multiple burdens was the only ground articulated in *Western Live Stock* (303 U. S. at 260) for holding that advertising receipts of interstate magazines could be taxed although radio advertising receipts, deriving from a substantially identical service, could not. *Fisher's Blend Station* v. *State Tax Commission, supra.* This is the only distinction between the two cases which has ever been suggested anywhere. If, as we believe, the distinction will be untenable for national magazines like appellant's should this Court sustain the pending Georgia and Minnesota taxes, the instant case perpetuates an anomaly which imposes an unwarranted burden upon magazines or grants an unmerited advantage to radio.

There is, in sum, a pressing need for clarification of the meaning and extent of the multiple-burden principle. The

need is sharpened by the potential creation of further inconsistencies following the decisions in the pending Minnesota and Georgia cases.

What we are urging, then, is that this appeal not be dismissed irrevocably while closely interrelated problems, which may well affect or be affected by the outcome here, are awaiting resolution by the Court. Delay for this sound reason can work no prejudice against New York City; the taxes in issue have been paid and this suit involves only refund claims. On the other hand, there is the threat of prejudice, not merely to this appellant but to the course of orderly adjudication in an area of intertwining complexities, resulting from summary rejection of this appeal while the Minnesota and Georgia cases await argument and decision.

CONCLUSION

For the reasons stated above, and in appellant's jurisdictional statement and reply brief, it is respectfully urged that rehearing be granted and probable jurisdiction noted, or that final decision on this petition be postponed pending the outcome of *Northwestern States Portland Cement Co.* v. *Minnesota*, No. 606 this Term, and *Williams* v. *Stockham Valves and Fittings, Inc.*, No. 763 this Term.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Counsel for Appellant